SONIA, WHAT'S A NICE PERSON LIKE YOU DOING IN COMPANY LIKE THAT?

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JUSTICE ROWE, concurring in part and concurring in the judgment.

No process for making federal procedural rules, however laudable, should be able to override substantive rights without positive involvement by politically accountable actors. That constraint is not only wise; it is also the mandate of the Rules Enabling Act ("Act" or "REA"), which specifies that Federal Rules promulgated pursuant to the Act—such as Federal Rule of Civil Procedure 23, at issue in this case—are not to "abridge, enlarge or modify any substantive right."[1] That limit is also why the plurality is profoundly mistaken, or at best dangerously misleading, when it says that a Federal Rule validly adopted under the Act's authority "to prescribe general rules of practice and procedure"[2] for the federal trial and appellate courts is "valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights."[3]

The REA process is an admirable one. Committees of judges, practitioners, and academics, appointed by the Chief Justice for their expertise and served by eminent academic Reporters who are responsible for proposal drafts and initial explanations, put forth and review possible changes in the various sets of Federal Rules. The process is open and deliberate, with notice, opportunity for comment, and public hearings, and often leads to redrafting with further vetting of revised proposals. The official organization of the federal judiciary, the Judi-

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1. 28 U.S.C. § 2072(b) (2006).

2. 28 U.S.C. § 2072(a) (2006).

3. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444 (2010) (Scalia, J., joined by Roberts, C.J., and Thomas and Sotomayor, JJ.) (citations omitted). Well, the plurality just may leave an opening. If the effect is not "incidental" but of a direct sort that abridges, enlarges, or modifies a substantive right, conceivably under the plurality's formulation § 2072(b) might still have some independent effect. But the sweeping nature of the plurality's assertion may leave some judges thinking that no impact on substantive rights could ever invalidate a Federal Rule, even as applied. And other statements in the plurality opinion make it appear that it indeed intends its universal-validity view in the strongest form. *See, e.g., id.* ("A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes).").

cial Conference of the United States, decides whether to recommend that the Supreme Court adopt rule amendments that have made it through these stages. If it so recommends, this Court—acting in a legislative capacity—decides whether to adopt the proposed amendments; if it adopts them, Congress has at least seven months to decide whether to block, delay, or alter the adopted amendments. But doing so takes an Act of Congress passed by both Houses and signed by the President, which happens rarely in this connection. Absent such action, the amendments adopted by the Supreme Court take effect.[4]

An admirable process, indeed. But no one officially involved in it ever, in his or her capacity as a committee member or federal judge, faces any voters or reports to anyone who does. There is, as Europeans sometimes say of European-Union processes, a "democratic deficit" here. To say that is not to condemn the REA process, which is appropriately designed as a largely technocratic rather than democratic one. The process is a subordinate form of lawmaking, operating under a partial delegation of Congress's undoubted power to make laws governing the jurisdiction of and procedure in the federal courts. That delegation comes with a limit against having proscribed effects on substantive rights, which does not constrain Congress if it chooses to exercise its rulemaking power on its own. Only a rule adopted with Congress's positive action, rather than its passive acquiescence, should be able thus to affect substantive rights.

Fortunately, the plurality's view that any Rule validly promulgated under the REA's general authority, in 28 U.S.C. § 2072(a), "to prescribe general rules of practice and procedure" for cases in the federal district and appeals courts is "valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights," lacks a majority and is therefore not authoritative. Indeed, the Court's divided opinions in this case mean that virtually no new *Erie*[5] law is made, save for the highly limited (and correct) holding by a majority that Federal Rule 23, authorizing class actions when certain criteria are met, and the New York provision at issue, mostly banning class actions for statutory penalties or minimum-recovery measures,[6] do conflict.

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4. For a fuller description of the REA process, see JAMES C. DUFF, A SUMMARY FOR THE BENCH AND BAR (2010), *available at* http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx.

5. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

6. N.Y. C.P.L.R. 901(b) (MCKINNEY 2010) ("Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.")

Further, the plurality's apparently extreme view on universal validity of generally valid Federal Rules is no more required by precedent than it is authoritative. *Sibbach v. Wilson & Co.*[7] did not face the universal-validity question, however much the plurality may strain to make it so appear. There is no dispute that a Rule that "really regulates procedure"[8] is generally valid under REA subsection (a), that a Rule's "incidental" effects on substantive rights do not bring it afoul of subsection (b),[9] or that a strong presumption of validity attaches to Federal Rules adopted pursuant to the REA process.[10] But whatever else *Sibbach* and later cases may have done, they have never squarely addressed the possibility that subsection (b)'s substantive-rights limit has independent force.[11] So whether a Federal Rule that is valid under REA subsection (a) is universally valid, or may in limited circumstances be invalid as applied because it infringes the substantive-rights limit in subsection (b), is an issue to be debated rather than deduced or assumed.

As there is no dispute about the several *Erie* propositions just mentioned, so there should be no dispute about the unsoundness of interpreting a statute to deny independent effect to distinct provisions.[12] Yet that is exactly what the plurality's apparent universal-validity approach would accomplish, by foreclosing any possibility of

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7. 312 U.S. 1 (1941).

8. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

9. *See, e.g.*, Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987); Hanna v. Plumer, 380 U.S. 460, 465 (1965).

10. *See Hanna*, 380 U.S. at 471 (footnote omitted) ("When a situation is covered by one of the Federal Rules, . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.")

11. Some cases have, however, hinted that it might, reflecting how the Court's decisions have not yet settled the issue the plurality wrongly treats as closed. *See* Business Guides, Inc. v. Chromatic Commc'ns Enters., 498 U.S. 533, 551 (1991) ("The [Rules Enabling] Act authorizes the Court 'to prescribe general rules of practice and procedure,' but provides that such rules 'shall not abridge, enlarge, or modify any substantive right.'"); *Burlington Northern*, 480 U.S. at 5 ("The Rules Enabling Act, however, contains an additional requirement. The Federal Rules must not 'abridge, enlarge or modify any substantive right . . . .'"). The plurality relies on these cases, *see Shady Grove*, 130 S. Ct. at 1442-43, while ignoring their caveats.

Language in cases like *Sibbach* that could be read as denying the possibility of independent force for REA subsection (b), *see Sibbach*, 312 U.S. at 10 (the Act "was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisions or caveats [including present 28 U.S.C. § 2072(b)] emphasize this restriction."), cannot be taken as deciding a question that was not before the Court. What the *Sibbach* Court rejected was a contention that rules adopted pursuant to the REA should not deal with already-recognized "important and substantial rights," *Sibbach*, 312 U.S. at 13 (with no focus on the procedural or substantive nature of such rights), not that a substantive right had been abridged, enlarged, or modified.

12. *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks

as-applied invalidity under REA subsection (b)'s substantive-rights limit for a rule that is generally valid as regulating "practice" and "procedure" under subsection (a). Impermissible direct modification, enlargement, or abridgement of a substantive right, as opposed to permissible "incidental" effects on such rights, by a truly procedural rule will be rare (indeed, its rarity is good reason not to shy from the prospect[13]); but the possibility of recognizing such forbidden effects should and does remain open.

A notable hypothetical example of a rule that would be valid under REA subsection (a) but run afoul of subsection (b)'s substantive-rights limit would be one establishing a limitations period for state-law claims in federal court.[14] Such a rule would be within the subsection (a) power because of the procedural concerns for docket control and adjudication of stale claims that are among the reasons for statutes of limitations.[15] But at least to the extent that the rule kept alive in federal court claims that would be untimely in state court, it would abridge substantive repose rights of defendants and enlarge substantive recovery rights of plaintiffs.

Neither Congress nor the REA process is at all likely to adopt such a rule of limitations. But the improbability of extreme hypotheticals that starkly illustrate the possible problem of invalidity, under REA subsection (b), of a rule valid under subsection (a) should not

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omitted); 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:6, at 230-37 (7th ed. 2007) (footnotes omitted):

> A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error. No clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will give force to and preserve all the words of the statute.

Justice Scalia admits that his universal-validity reading of *Sibbach* "is hard to square with § 2072(b)'s terms," *Shady Grove*, 130 S. Ct. at 1446 (Scalia, J., joined by Roberts, C.J., and Thomas, J.) (footnote omitted)—a difficulty readily avoided by observing accepted canons of statutory construction and allowing the possibility of independent effect, however limited and rare, to § 2072(b)'s substantive-rights limitation.

13. And if a Federal Rule were held invalid as impermissibly affecting substantive rights, yet it seemed important for the rule to apply without exception, Congress is not subject to the substantive-rights limit that it has written into the REA and could adopt the rule by statute. Requiring the highest, and electorally accountable, federal lawmaking body to act if substantive rights are to be directly affected is an appropriate power allocation for a federalist democracy.

14. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 726-27 (1974) ("[A] Federal Rule prescribing [a limitations period for diversity cases] would satisfy the Enabling Act's first sentence [now 28 U.S.C. 2072(a)]. It should not get by the second sentence [now 28 U.S.C. § 2072(b)], however, for the substantive rights established by state statutes of limitations would be abridged by applying such a Federal Rule.") (footnote omitted).

15. *See id.* at 726 (describing "procedural purposes" of statutes of limitations "to keep down the size of the docket and to ensure that cases will not be tried on evidence so stale as to cast doubt on its trustworthiness.").

prevent recognition of impermissible effects on substantive rights in rare but realistic cases. Such a case was *Douglas v. NCNB Texas National Bank*,[16] in which the Fifth Circuit held that a lender's contractual right, under Texas law, to pursue nonjudicial rather than judicial foreclosure was substantive and infringed by Federal Rule of Civil Procedure 13(a) on compulsory counterclaims, to the extent that the Rule would "force the lender to pursue a judicial foreclosure remedy."[17] Rule 13(a), of course, is generally valid under REA subsection (a); and under *Douglas* it remains valid and applicable in federal courts generally and in Texas federal courts in particular, except for the unusual case in which it collides with the right under Texas state law to choose nonjudicial rather than judicial foreclosure.

As it is fortunate that the plurality's universal-validity position is not the law, it is also fortunate that cases realistically raising a serious possibility of as-applied invalidity of a Federal Rule under REA subsection (b) will be almost vanishingly rare. The undisputed validity of most Federal Rules in nearly all applications under modern *Erie-Hanna* jurisprudence means that admitting the possibility of limited as-applied invalidity poses nothing like the danger of widespread invalidation of Federal Rules[18] that appeared to exist under the Court's decisions between *Guaranty Trust Co. of New York v. York*[19] and *Byrd v. Blue Ridge Electrical Cooperative*.[20] Thus the majority's concern for federal courts having to plumb the purposes of state laws in large numbers of cases[21] is misplaced, and the need for federal courts to do so in a very few cases is one that this Court cannot shirk under subsection (b)'s mandate that requires policing against impermissible effects on substantive rights.

This case itself further illustrates the likely rarity of as-applied invalidity of a generally valid Federal Rule. No member of the Court

16. 979 F.2d 1128 (5th Cir. 1992).

17. Douglas v. NCNB Tex. Nat'l Bank, 979 F.2d 1128, 1130 (5th Cir. 1992). *See also* Stichting Ter Behartiging v. Schreiber, 407 F.3d 34, 47 (2d Cir. 2005) ("[T]he procedures set forth in Rule 17(a) [on real party in interest] are inapposite in situations where the real party in interest defect is created by lack of compliance with state substantive law, and th[e] application of Rule 17(a) in such circumstances would effect an impermissible enlargement, through the Federal Rules, of state substantive rights. *See* 28 U.S.C. § 2072(b).").

18. *See, e.g.*, Edward Lawrence Merrigan, Erie *to* York *to* Ragan—*A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 711-12 (1950) (arguing that under this Court's decisions in Ragan v. Merchants Transfer & Warehouse Co., 330 U.S. 530 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); and Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) "[p]ractising attorneys are unable to determine which of the Federal Rules will remain in full effect, and which might be rejected by the courts on the theory that they conflict in a substantial way with some state law").

19. 326 U.S. 99 (1945).

20. 356 U.S. 525 (1958).

21. *Shady Grove*, 130 S. Ct. at 1440-41.

finds Rule 23 subject to serious question, on its face or as applied. The majority finds a conflict between Rule 23 and C.P.L.R. 901(b), resolving that conflict (on varying rationales, as to which there is no majority) in Rule 23's favor. The dissent would apply the New York provision but reaches that conclusion by finding no conflict rather than seeing Rule 23 as invalid because of a conflict. As the majority's discussion in part II-A of its opinion through footnote six establishes,[22] Rule 23 and C.P.L.R. 901(b) do conflict; the one authorizes class actions, while the other if applied in federal court would forbid them in certain circumstances for which the Federal Rule makes no exception.

The conflict between the two provisions makes it necessary to face the question whether C.P.L.R. 901(b) creates a substantive right that would be abridged, enlarged, or modified by allowing a class action in federal court under Rule 23. As Justice Stevens says, "the bar for finding an Enabling Act problem is a high one."[23] And his concurrence in the judgment explains why there is no REA violation here,[24] so that Rule 23 is valid as applied in this case as well as generally.

The dissent's appropriate emphasis on New York's concern for possibly "annihilating" liability from class actions for statutory penalties or minimum recoveries[25] does call for some attention to how, if at all, New York might serve that purpose with respect to actions in federal court, given that C.P.L.R. 901(b) does not apply to forbid them there. No alternative provision is before the Court, so nothing definitive can appropriately be said at the moment. But cases such as *Gasperini* acknowledge the applicability of state-law remedy limits in

22. *Id.* at 1437-40 (opinion of the Court). The criticism of the dissent's use of state legislative purpose later in part II-A, *see id.* at 1440-41, is unwarranted and contrary to precedent. The aims of state laws are relevant to whether a state law should be regarded as substantive or procedural, *see* Gasperini v. Center for Humanities, 518 U.S. 415, 429 (1996) (pointing to "manifestly substantive" nature of state's "objective" in deciding whether to hold state verdict-excessiveness standard applicable in state-law action in federal court), and thus bear in a case involving a Federal Rule at least on whether the rule impermissibly affects a substantive right.

Also contrary to precedent is the prevailing opinion's resistance to giving weight to whether a state provision with a procedural cast is "'sufficiently intertwined with a state right or remedy,'" *Shady Grove*, 130 S. Ct. at 1446 n.11 (opinion of Scalia, J., joined by Roberts, C.J., and Thomas, J.) (quoting *id.* at 1455 (Stevens, J., concurring in part and concurring in the judgment)), or "bound up" with a substantive state policy, *id.* at 1447. Like it or not, this Court has recognized the significance in the *Erie* context of whether such a state rule is "intended to be bound up with the definition of the rights and obligations of the parties." *Byrd*, 356 U.S. at 536.

23. *Shady Grove*, 130 S. Ct. at 1457 (Stevens, J., concurring in part and concurring in the judgment).

24. *Id.* at 1457-60.

25. *Id.* at 1464 (Ginsburg, J., dissenting).

federal court,[26] and various limits—such as maximum recovery in a single action for a statutory penalty or under a minimum-recovery provision, or a limit on recovery in a class action to actual damages rather than statutory amounts—can be imagined. Such provisions might lead to results that would eliminate the conflict in the present case, whether by foreclosing the possibility of federal jurisdiction, or making a federal-court case one that would not qualify for class certification under Rule 23, or permitting a federal-court class action with a state-law remedy limit that posed no conflict with Rule 23. Today's decision lets the New York Legislature consider whether and how to craft a provision that might, in cases that come within federal courts' jurisdiction, protect against liability that is unavailable in the courts of New York.

26. *See Gasperini*, 518 U.S. at 428 ("We start from a point the parties do not debate. . . . [A] statutory cap on damages would supply substantive law for *Erie* purposes.").